No. 92-2046

Supreme Court, U.S.
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In The Supreme Court of the United States

October Term, 1993

Republican Party of North Carolina, *et al.*,
Respondents,

v.

James B. Hunt, Jr., Governor of North Carolina, *et al.*,
Petitioners,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Should *Davis v. Bandemer's* holding that a claim of partisan political gerrymandering involving the election of legislators is justiciable be extended to a claim involving a state's method of electing its judges?

2. Are there judicially discoverable and manageable standards for adjudicating a claim that the statewide election of judges is a partisan political "gerrymander" in violation of the Fourteenth Amendment?

3. Can a court resolve a political gerrymandering challenge to the statewide election of judges without making initial policy decisions of a type that the judiciary cannot and should not make?

4. Does the Fourteenth Amendment's prohibition of partisan political gerrymanders override a state's fundamental decisions about the organization of its judiciary?

5. Is *Bandemer's* threshold test for showing degradation of a minority political group's influence on the political process as a whole satisfied by allegations of electoral defeat limited to the particular electoral process under review?

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LIST OF PARTIES

The individual petitioners before this Court were named in their official capacities in the proceedings below and have been substituted as directed by Fed. R. App. P. 43(c). These petitioners are James B. Hunt, Jr., Governor of North Carolina; William A. Marsh, Jr., Chairman of the North Carolina State Board of Elections; and Board of Elections members Ruth Turner O'Bryan; June K. Youngblood; Gregg O. Allen; and M. H. Hood Ellis. The North Carolina State Board of Elections was also an original party and joins in this petition. The Durham County Board of Elections, Forsyth County Board of Elections and Guilford County Board of Elections were original parties but were not parties to the appeal to the Fourth Circuit and are not named as parties herein. The North Carolina Association of Black Lawyers is an intervenor-defendant and was a party to the appeal to the Fourth Circuit. It does not join in this petition.

The respondents before this Court are the Republican Party of North Carolina; Bruce Briggs; William R. Sigmon; Marvin K. Gray; R. Howard Riddle; Lloyd Fowler; Joe R. Wilson; R. Walter White; Edgar A. Readling, Jr.; Frederic M. Gallagher; and Ralph A. Walker.

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v.

James B. Hunt, Jr., Governor of North Carolina, *et al.*,
Petitioners,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Defendants/Appellees, the Governor and other officials of the State of North Carolina, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals panel is reported at 980 F.2d 943 (4th Cir. 1992), and is reprinted at pages 1a-40a of the appendix to this petition. The order of the court of appeals *in banc* denying the state appellees' petition for a rehearing, and Circuit Judge Phillips's dissent from that decision, are reported at --- F.2d ---, 1993 WL 129660

(April 27, 1993), and are reprinted at pages 85a-106a of the appendix. The district court's orders dismissing the complaint and denying the plaintiffs' Rule 60(b) motion are unreported. They are reprinted at pages 41a-74a and 75a-83a of the appendix.[1]

JURISDICTION

The judgment of the court of appeals was entered on November 24, 1992. The court denied rehearing and rehearing *in banc* on April 27, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case involves the lawfulness of decisions by the citizens of North Carolina regarding the structure of their judicial system, specifically their decision to provide for the statewide election of their principal trial judges, the judges of the superior court.[2] Since 1868 the North Carolina Constitution has required the election of superior court judges and has authorized the General Assembly to provide for their election on either a statewide or district basis. N.C.

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[1] Additional references to the reprinted materials contained in the appendix to this petition will be indicated as "App. ___."

[2] Superior court judges have "exclusive, original jurisdiction" for the trial of all felonies, N.C. Gen. Stat. § 7A-271-72, and have jurisdiction for the trial of all civil actions in which the amount in controversy exceeds ten thousand dollars ($10,000), N.C. Gen. Stat. § 7A-243.

Const. art. IV, § 16 (App. 110a-111a).[3] Since 1877, the General Assembly has provided for the statewide election of superior court judges. N.C. Gen. Stat. § 163-1 (current provision). Since 1915, when the General Assembly adopted a primary system for political parties to nominate their candidates, the nomination of candidates for statewide election as superior court judges has been by primaries held in local judicial districts. N.C. Gen. Stat. § 163-104 *et seq.* (current provisions). Thus, the major features of the electoral system at issue in this action -- nomination of superior court judges by district primary and election by statewide vote -- have been in place for more than three-quarters of a century.[4]

The decision to provide for the election of superior court judges on a statewide basis is entirely rational. Superior court judges are statewide officials by constitutional definition as well as the authority conferred upon them. Under the Constitution, they have "original general jurisdiction throughout the State" and are required to ride circuit over a wider territory than their districts of residence. N.C. Const. art. IV, §§ 12(3) and 11 (App. 109a, 110a). Likewise, the decision to provide for the nomination of superior

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[3] This same constitutional provision requires the election of justices of the supreme court and judges of the court of appeals on a statewide basis.

[4] In 1972 this Court affirmed North Carolina's long-standing practice of nominating superior court judges at district primaries and electing them on a statewide basis against an equal protection challenge. *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971) (three-judge court), *aff. mem.*, 409 U.S. 807 (1972).

court judges at district primaries is entirely rational. In addition to their statewide duties, superior court judges also exercise certain statutory powers within their individual districts; these strictly local powers, for the most part, concern the appointment and supervision of local court personnel.[5]

This action was instituted on November 4, 1987. The complaint alleged that various aspects of the state's method of electing superior court judges violate the First and Fourteenth Amendments to the United States Constitution.[6] Essentially, the Republican Party of North Carolina, which has been successful in statewide elections for such offices as governor, lieutenant governor, court of appeals judge and United States senator, is alleging a claim of political gerrymandering in the statewide election of superior court judges because in modern times only one Republican has won

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[5] For example, *see* N.C. Const. art. IV, § 10 (App. 108a) (senior resident superior court judge appoints magistrates); N.C. Gen. Stat. § 7A-100(a) (fills vacancies in the office of clerk of superior court); *id.* § 7A-466(d) (appoints local public defenders).

[6] The plaintiff's complaint was precipitated by a 1987 law ("Chapter 509") imposing a district residency requirement on superior court candidates in the party primaries. Chapter 509 was enacted in large part in response to a legal action, *Alexander v. Martin*, No. 86-1048-CIV-5 (E.D.N.C. 1987), which alleged that the state's system of electing superior court judges abridged nonwhite voting strength in violation of the Voting Rights Act. Chapter 509 also eliminated staggered terms within multimember judicial districts, created new districts, and redrew existing district lines. The Supreme Court of North Carolina upheld the validity of Chapter 509 against state constitutional challenge in *State ex rel. Martin v. Preston*, 325 N.C. 438, 385 S.E.2d 473 (1989).

statewide election to the superior court. The relief plaintiffs specifically request is an injunction mandating superior court elections by district and abolishing the district residency requirement for candidates in the district-wide primaries. The defendants moved to dismiss the complaint for failure to state a claim, Fed. R. Civ. P. 12(b)(6), and on June 7, 1991, the United States District Court for the Eastern District of North Carolina granted the motion. The district court concluded that the plaintiffs' challenge to the election of superior court judges on a statewide basis presented a non-justiciable political question. The district court held the candidate residency requirement constitutional under *Hadnott v. Amos*, 320 F. Supp. 107 (M.D. Ala. 1970), *aff'd mem.*, 401 U.S. 968 (1971) and 405 U.S. 1035 (1972). The district court subsequently denied the plaintiffs' motion for relief from the judgment under Rule 60(b). The plaintiffs appealed the ruling on justiciability to the court of appeals, but did not appeal the decision upholding the candidate residency requirement.

On appeal, a panel of the United States Court of Appeals for the Fourth Circuit held, in pertinent part, that the plaintiffs' challenge to the statewide election of superior court judges is justiciable and that the complaint stated a valid political gerrymandering claim. By a vote of 8-3, with one judge not participating, the court of appeals denied the defendants' petition for rehearing and rehearing *in banc*. Writing for the dissenting judges in the *in banc* proceeding, Circuit Judge Phillips concluded that the district court had correctly dismissed the complaint as non-justiciable, and that even if the plaintiffs' claims were cognizable, the complaint

failed to state a claim under this Court's decision in *Davis v. Bandemer*, 478 U.S. 109 (1986).

REASONS FOR GRANTING THE WRIT

This case presents fundamental questions of first impression about the authority and competence of federal courts to reshape the basic structure of a state's judiciary. The resolution of these questions will have importance far beyond the particular facts and parties of this case because they involve basic issues of federalism and federal jurisdiction that are of wide-ranging significance. This Court should grant the petition for writ of certiorari in order to settle these questions. The decision below, in addition, is squarely in conflict with every other reported decision by the lower federal courts concerning the interpretation and application of *Davis v. Bandemer*, 478 U.S. 109, a conflict that only this Court can resolve.

Relying on this Court's decision in *Davis v. Bandemer*, holding a claim of political gerrymandering in the redistricting of a state legislature to be justiciable, the court of appeals below extended the reasoning in *Bandemer* into uncharted territory by finding that a claim of political gerrymandering challenging the statewide election of judges is justiciable. This novel ruling transforms the carefully limited *Bandemer* decision into a general license to challenge state electoral systems on political "fairness" grounds, unrestrained by any established equal protection principles and unguided by any recognized and judicially manageable

standards.[7] The decision below is without any support in this Court's decisions, and indeed is contrary to the Court's caselaw interpreting the Fourteenth Amendment. This Court should grant the petition for writ of certiorari in order to correct the appeals court's misinterpretation of *Bandemer*.

The decision below also assumes that the Equal Protection Clause authorizes federal courts to redesign a state's fundamental method of self-governance, an assumption flatly contrary to the decisions of this Court. *See Gregory v. Ashcroft*, 501 U.S. ---, 111 S. Ct. 2395 (1991) (a state's choice about the structure of its judiciary and the manner of its selection is a decision of the most fundamental sort for a sovereign entity). The holding of the court below, therefore, has wide-ranging implications not only for the structure of judicial elections in North Carolina, but also for the validity of the systems of judicial elections in thirty-nine other states.[8] If the lower court's decision is allowed to

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[7] The *Bandemer* decision already has been the subject of confusion among the courts and criticism by the commentators. *See e.g.*, Schuck, "The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics," 87 Col. L. Rev. 1325 (1987) (*Bandemer* fundamentally unsound); Miller & Packman, "The Constitutionality of Political Gerrymandering - *Davis v. Bandemer* and Beyond," 4 J.L. & Politics 697 (1988) (same). This provides an additional basis for the court to grant certiorari in this case.

[8] A survey by the Conference of State Court Administrators and the National Center for State Courts reports that 40 states use some form of election process to select trial court judges, whether by regular election or retention election after appointment. Although North Carolina is

(continued...)

stand, many or all of these states face potential legal challenges to their fundamental choices about the structure of their court systems. This Court should grant the petition for a writ of certiorari in order to clarify the extent to which the Fourteenth Amendment overrides principles of federalism.

Finally, the court below has ignored the reasoning of every other federal court regarding the meaning and application of the stringent threshold test required by the *Bandemer* plurality to establish a claim of unconstitutional gerrymandering. This threshold test requires allegations of electoral arrangements that "consistently degrade [a plaintiff's] influence on the political process as a whole." *Bandemer*, 478 U.S. at 132 (emphasis added). Ignoring the evident meaning of the *Bandemer* test, as well as the decisions of other federal courts which have been summarily affirmed by this Court, the court below construed *Bandemer* to allow a claim based solely on a party's failure to win election to the particular office challenged. This Court should grant certiorari in order to resolve the conflict the decision below creates among the federal courts.

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[8](...continued)
unique in its election of trial court judges by district primaries and statewide general elections, 32 states elect at least some of their appellate judges in statewide elections, and 19 states elect at least some of their appellate judges in district or county elections. The non-statewide elections tend to be for intermediate courts of appeals, although in 6 states all appellate judges are elected by districts. In 16 states, election of some judges is by partisan elections. *See* State Court Organization 1987.

I. THE COURT OF APPEALS ERRED IN HOLDING THAT A COMPLAINT CHALLENGING THE POLITICAL FAIRNESS OF NORTH CAROLINA'S DECISION TO ELECT SUPERIOR COURT JUDGES ON A STATEWIDE BASIS IS JUSTICIABLE UNDER *DAVIS V. BANDEMER*.

It is a fundamental principle of the law of the federal courts that the power of those courts to adjudicate disputes is limited to "justiciable" cases and controversies. From the very beginning this Court has insisted that "[q]uestions in their nature political" are not subject to judicial decision. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). The political question doctrine concerns the limits of the judicial power under Article III of the Constitution. "Concerns of justiciability go to the power of the federal courts to entertain disputes, and to the wisdom of their doing so." *Renne v. Geary*, 501 U.S. ---, 111 S. Ct. 2331, 2336 (1991).

The leading case outlining the political question doctrine is *Baker v. Carr*, 369 U.S. 186, 217 (1962), which described the doctrine as applying in cases in which there is present

> . . . a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a

> kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Applying the principles from *Baker v. Carr*, this Court held for the first time in *Davis v. Bandemer*, 478 U.S. 109, that a claim alleging a partisan political gerrymander of a state legislature did present a justiciable question of law because such a claim goes "to the adequacy of representation in state legislatures," and because judicially discoverable and manageable standards existed to resolve the claim. *Id.* at 124-25.

The court below has improperly extended *Bandemer*'s holding to a case involving neither the gerrymandering of electoral districts nor the threat gerrymandering can pose to fair representation. The decision of the court below, unlike *Bandemer*, does not draw on established equal protection principles about disputes over the purpose and effects of districting. *See id.* at 123-25. Instead, the court undertook the task of evaluating the wisdom of a state decision to elect state officials on a statewide basis. There are no recognized and judicially manageable standards to guide such an evaluation, and a decision in the plaintiffs' favor necessarily would involve making a policy decision about the appropriate

structure of the state's judicial elections. From the perspective of the federal courts, this decision involves a political question that is not susceptible to judicial resolution. This question is of such fundamental importance that this Court should grant certiorari in order to clarify the meaning and limits of *Bandemer*'s holding on the justiciability of political gerrymandering claims.

A. THE RATIONALE OF *DAVIS V. BANDEMER* DOES NOT EXTEND TO CLAIMS INVOLVING A STATE'S METHOD OF ELECTING ITS JUDGES.

The decision of the court below represents a major extension of this Court's holding in *Bandemer*, an extension that goes well beyond the rationale for the Court's holding. *Bandemer* involved the alleged partisan political gerrymandering of state legislative districts by the majority party in the legislature; in that context this Court concluded that a claim by the members of a political party that its voting power has been diluted to the point of essential exclusion from the political process as a whole by such gerrymandering is justiciable. "[T]he issue is one of representation, and we decline to hold that such claims are never justiciable." *Id.* at 124.

The decision in *Bandemer* was "expressly grounded" in the Court's concern "with the unique threat posed to truly representative government by state apportionment and districting decisions affecting the very legislative bodies that are the indispensable core of that form of government." *Republican Party of North Carolina v. Hunt*, --- F.2d ---, ---

(4th Cir. 1993) (Phillips, Cir. J., dissenting from denial of rehearing *in banc*) (App. 92a). This Court described the underlying constitutional value at stake in *Bandemer* as "the objective of fair and adequate representation," 478 U.S. at 125 n. 9. The justiciability of claims implicating this objective was demonstrated, in the Court's view, by the one person, one vote and racial gerrymandering decisions which addressed "issue[s] of fair representation" in legislative bodies. *Id.* at 123 (one person, one vote). *Accord, id.* at 124-25 (racial gerrymanders). The Court therefore rejected Justice O'Connor's argument that entertaining political gerrymandering challenges to state legislative apportionments would require the courts to make "an initial policy decision that the judiciary should not make." *Id.* at 125. *Cf. id.* at 155 (O'Connor, J., concurring in the judgment).

Bandemer thus rests squarely on the Court's conclusion that the Equal Protection Clause provides some guarantee of "the adequacy of representation in state legislatures." *Id.* at 124.[9] It was the danger of a "lack of responsiveness by those elected to the concerns" of the voters they represent that justified judicial scrutiny of the state legislative redistricting plan. *Id.* at 131-34 (plurality opinion). *Accord, id.*

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[9] Both the case law on which *Bandemer* relied, and the Court's extensive discussion of the focus on the question of fair representation, indicate that *Bandemer*'s holding applies to cases involving the apportionment of congressional seats and of local government legislative bodies. Subsequent decisions therefore have adjudicated political gerrymandering challenges to congressional redistricting plans. *See, e.g., Badham v. Eu*, 694 F. Supp. 664, 667-68 (N.D. Cal. 1988), *aff'd mem.*, 488 U.S. 1024 (1989).

at 169-70 (Powell, J., dissenting). Because legislators ought to take their constituents' interests into account, an electoral scheme that insulates them from the influence of an identifiable political group raises justiciable questions of constitutional magnitude. The present case, in contrast, presents no question of fair representation. The plaintiffs' disagreement is with the state's mode of electing judges, the quintessentially non-representative governmental officials. Judges are not obligated to act in a politically responsive manner or to make decisions in accordance with the views of a constituency; indeed, the judicial obligation is precisely the reverse.[10] The court of appeals observed that the plaintiffs

> conced[e] that [they] have no complaint concerning the performance of superior court judges, that while elected judges are representative governmental officials, they do not represent constituents in the same sense as elected members of the legislative and executive branches, and that consequently, superior court judges could not be found to inadequately represent minority group interests. [*Republican Party of North Carolina v. Martin*, 980 F.2d 943, 958 (4th Cir. 1992) (App. 32a)]

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[10] As this Court has observed, "[i]t is a serious accusation to charge a judicial officer with making a politically motivated decision. By contrast, it is to be expected that a legislator will vote with due regard to the views of his constituents." *Clements v. Fashing*, 457 U.S. 957, 968 (1982).

Despite these concessions, the court below concluded that *Bandemer* should nevertheless be extended to include a challenge to the statewide election of superior court judges. That conclusion is contrary to the reasoning that underlies the settled caselaw that the one person, one vote principle does not apply to judicial elections. In the leading case, *Wells v. Edwards*, 347 F. Supp. 453 (M.D.La. 1972), *aff'd mem.*, 409 U.S. 1095 (1973), a three-judge district court concluded that

> "Judges do not represent people, they serve people." Thus, the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary. [347 F. Supp. at 455 (citation omitted).]

Wells therefore held that a claim that individual voters' right to vote is impermissibly diluted by non-equipopulous districts is not justiciable because "'[t]he State judiciary, unlike the legislature, is not the organ responsible for achieving representative government.'" *Id.* at 456 (citation omitted). This reasoning points unmistakably to the conclusion that a claim that the right to vote of a political group is impermissibly diluted by statewide judicial elections is equally non-justiciable.[11] Although this Court recently confirmed the

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[11] The dissenting judges in the rehearing proceeding in the court of appeals concluded that "[t]he first and fundamental error in our panel's decision" was its expansion of *Bandemer* beyond that decision's reason-

(continued...)

continuing authority of *Wells*, *see Chisom v. Roemer*, --- U.S. ---, 111 S. Ct. 2354, 2368 (1991),[12] the court below erroneously declined to follow *Wells*' reasoning. *Martin*, 980 F.2d at 954 (App. 22a-23a).

The authority of the judiciary in constitutional matters rests on the courts' exercise of reasoned judgment. The decision of the court below abandons the reasoning that led this Court to its decision in *Davis v. Bandemer* in order to

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[11](...continued)
ing, and cited *Wells* as "[t]he prime pointer" indicating the panel's error. *Hunt*, --- F.2d at --- (App. 90a). Judge Phillips explained:

> *Wells*' rationale for the non-justiciability of one-person, one-vote claims respecting judicial elections necessarily extends as well to the non-justiciability of group vote-dilution claims respecting such elections. I do not see how, if having one's individual vote in judicial elections denied equal weight to that of all others in the voting constituency is not the subject of a justiciable constitutional claim, having an identifiable political group's voting power in such elections "diluted" by partisan political gerrymandering could be. The one is no more nor less relevant to "preserv[ing] a truly representative government" under the *Wells* rationale. [*Id.* at --- (App. 91).]

[12] The court of appeals inexplicably treated *Chisom*, which held that § 2 of the Voting Rights Act applies to judicial elections, as limiting *Wells* to the one person, one vote context. *Martin*, 980 F.2d at 953 (App. 20a-21a). As the dissenting judges in the *in banc* proceeding observed, the panel's "reliance [on *Chisom*] is . . . simply misplaced." *Hunt*, --- F.2d at --- (App. 93a). "[T]he *Chisom* Court was at pains to disclaim any relevance of its analysis of the concededly broader reach of § 2's coverage to the reach ('justiciability') of related constitutional voting rights concerns. *Chisom*, 111 S. Ct. at 2361, 2368." *Id.* (App. 94a)

extend *Bandemer*'s conclusion to an issue plainly outside *Bandemer*'s scope. The court did so in the teeth of contrary caselaw (*Wells*) and, most tellingly, with respect to the very doctrine[13] that distinguishes those questions that are subject to the courts' exercise of judgment from those that are not. The consequence will be to transform *Bandemer* into a general invitation to litigate questions of political fairness in state electoral systems, which is the very consequence the *Bandemer* Justices were unanimously concerned to avoid. *See, e.g.*, 478 U.S. at 126; *id.* at 133-34 (plurality opinion); *id.* at 147 (O'Connor, J., concurring in the judgment); *id.* at 172-73 (Powell, J., dissenting).

B. THERE ARE NO JUDICIALLY DISCOVERABLE AND MANAGEABLE STANDARDS FOR ADJUDICATING A CLAIM THAT THE STATEWIDE ELECTION OF JUDGES IS AN UNCONSTITUTIONAL POLITICAL "GERRYMANDER."

One of the primary indications that a constitutional claim is a non-justiciable political question is that there is "a lack of judicially discoverable and manageable standards for resolving it." *Baker v. Carr*, 369 U.S. at 217; *United States Department of Commerce v. Montana*, --- U.S. ---, 112 S. Ct. 1415, 1424 (1992). The decision of the court of appeals

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[13] The political question doctrine identifies those cases that present issues "not amenable to judicial resolution." *United States Department of Commerce v. Montana*, --- U.S. ---, 112 S. Ct. 1415, 1424 (1992). "*[A]bstention* from judicial review" is the appropriate judicial action "in the case of a true political question." *Id.* at 1425.

below disregarded the absence of any such standards for the resolution of this case.

In concluding that manageable standards exist for deciding cases about political gerrymandering in the apportionment of state legislative seats, *Davis v. Bandemer* stressed the similarity between such cases and earlier decisions. In the racial gerrymandering cases, for example, "[t]he claim . . . was that an identifiable racial or ethnic group had an insufficient chance to elect a representative of its choice and that district lines should be redrawn to remedy this alleged defect." 478 U.S. at 124. Similarly, in *Gaffney v. Cummings*, 412 U.S. 735 (1973), "the claim was that the legislature had manipulated district lines to afford political groups in various districts an enhanced opportunity to elect legislators of their choice." 478 U.S. at 124. The possibility of making parallel inquiries into the intended effects of particular district lines on identifiable political groups, the Court believed, made *Bandemer*-type political gerrymandering cases equally susceptible to judicial resolution. *Id.* at 125.[14]

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[14] The majority that agreed on the existence of judicially manageable standards did not, however, agree on what those standards are. "As is evident from the several opinions filed today, there is no 'Court' for a standard that properly should be applied in determining whether a challenged redistricting plan is an unconstitutional partisan political gerrymander." 478 U.S. at 185 n. 25 (Powell, J., dissenting). Uncertainty about the proper standards to employ in political gerrymandering cases, and the conflict the decision below has created among the lower federal courts, are in themselves compelling reasons for this Court to grant certiorari and review the holding of the court of appeals.

In the present case, by contrast, "the equal protection standards developed and applied in the one-person, one-vote and racial vote-dilution cases" cannot be employed. *Hunt*, --- F.2d at --- (Phillips, Cir. J., dissenting from denial of rehearing *in banc*) (App. 95a).

> A unique, critical feature of contemporary group vote dilution jurisprudence (the source, per *Bandemer*, of whatever standards would be available in this case) is that the existence of a dilution-by-districting (or failure-to-district) violation can only be determined by identifying electoral districts which would not violate the group's voting rights because in those districts they would constitute effective voting majorities. . . . Critical to this process for resolving vote-dilution claims, therefore, is a court's ability to determine with sufficient precision two things: the identity of the group claiming violation of its rights -- so that its numbers, hence its potential voting strength, can be determined; and the appropriate geographical areas within which its potential voting strength so calculated is to be measured. [*Id.* at --- (App. 96a-97a).]

Judge Phillips concluded that these "interrelated proof requirements" would present "intractable" problems in the context "of a political group's vote dilution challenge to a state's design for electing judges." *Id.* at --- (App. 97a).

In this case, the identifiable political group the plaintiffs purport to represent does not consist of "registered members of one party," as was the case in *Bandemer*. *Martin*, 980 F.2d at 956 n. 23 (App. 27a). Instead, plaintiffs define the political group allegedly harmed as "not just Republicans but an indeterminate number of sometime allied non-Republican voters." *Hunt*, --- F.2d at --- (Phillips, Cir. J., dissenting from denial of rehearing *in banc*) (App. 97a). The court of appeals below concluded that such a group constituted a sufficiently "identifiable political group" to fall within *Bandemer*, and that in any event "the Republican Party of North Carolina alone would be sufficient to constitute an identifiable group." *Martin*, 980 F.2d at 956 n. 23 (App. 27a). The court's reasoning is not persuasive. As the dissenting judges in the *in banc* proceeding observed, the inclusion of non-Republican plaintiffs in the complaint was neither fortuitous nor a correctable pleading error. "The reason the group so defines itself is obvious: only so could it identify a significant number of appropriately configured judicial districts in which the group would constitute effective voting majorities." *Hunt*, --- F. 2d at --- (App. 97a). The impossibility of devising manageable judicial standards for answering the resulting question -- "how does a court determine the consistently reliable voting strength of a political party's non-party voting allies for particular electoral offices?," *id.* at --- (App. 98a), clearly identifies the plaintiffs' claim as a political question.

The basic problem of determining whether a state's decision to elect judges with statewide jurisdiction on a statewide basis should be treated as an unconstitutional

"gerrymander" is equally resistant to judicial solution. "Gerrymandering is 'the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes.'" *Bandemer*, 478 U.S. at 164 (Powell, J., dissenting) (citation omitted). *See also id.* at 116-17 & n. 6 (plurality opinion) (discussing the alleged use of "familiar techniques of political gerrymandering"). In challenges to local legislative elections, "the appropriate geographical areas . . . within which to measure [plaintiffs'] voting strength," *Hunt*, --- F.2d at --- (Phillips, Cir. J., dissenting from denial of rehearing *in banc*) (App. 106a), are defined by the boundaries of the local governmental units, while in a case involving congressional or state-legislative districts, a court can resolve the controversy within the framework of representative districts ordained by constitutional provisions or by statute. In the present case, in contrast, the plaintiffs ask the courts to decide whether the Constitution prohibits a state from maintaining statewide elections for officials with statewide authority. It is obvious that electing such officials on a statewide basis may have political consequences; it is equally obvious that the propriety of doing so cannot be measured by legal standards developed to determine whether a legislature has used its powers to manipulate the size, shape or number of representatives elected in particular districts.[15] There is no judicially discoverable metric by

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[15] The plaintiffs' argument implicitly treats North Carolina's statewide election of superior court judges as analogous to at-large local government elections or to multi-member districts in which racial or political groups claim that the state has deliberately failed to create single-member districts in some of which the groups could elect candidates of

(continued...)

which a court can determine whether the desirability of attempting to make more likely the election of a certain party's judicial candidates outweighs the state's interest in the fundamental structuring of its judicial system. The claim the plaintiffs raise is, therefore, "judicially unmanageable in the ultimate sense: it cannot be resolved except by making an 'initial policy decision' -- here one concerning the basic structure of a state's judicial system -- that is 'not for judicial decision.'" *Id.* at --- (App. 99a).

C. THE COURTS CANNOT RESOLVE A POLITICAL GERRYMANDERING CHALLENGE TO THE STATEWIDE ELECTION OF JUDGES WITHOUT MAKING INITIAL POLICY DECISIONS OF A TYPE THAT THE JUDICIARY CANNOT AND SHOULD NOT MAKE.

A legal action that cannot be decided "without an initial policy determination of a kind clearly for nonjudicial discretion" is not justiciable; it is, rather, a political question which the courts cannot address on the merits. *Baker v. Carr*, 369 U.S. at 217; *United States Department of Commerce v. Montana*, 112 S. Ct. at 1424-25. The decision

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[15](...continued)
their choice. The analogy is false: the boundaries and political makeup of the states themselves, unlike those of local political units or of legislative districts, are not subject to political manipulation by legislative majorities. *Cf. Kirkpatrick v. Preisler*, 394 U.S. 526, 534 n. 4 (1969) (problem of partisan gerrymandering in congressional districting exists because "the legislature [is] free to choose which of several subdivisions, all with their own political complexion, to include in a particular congressional district").

below that the present case is justiciable transgresses this fundamental limitation on the judicial function by mandating the adjudication of a claim which cannot be resolved without determining what "the basic structure of a state's judicial system" ought to be. *Hunt*, --- F.2d at --- (Phillips, Cir. J., dissenting from denial of rehearing *in banc*) (App. 99a).

In *Davis v. Bandemer*, the Court acknowledged that adjudicating a political gerrymandering challenge to a state legislative reapportionment plan would require an "initial policy decision" about "the desirability of fair group representation." The Court denied that this rendered the case non-justiciable because "the objective of fair and adequate representation" is implicit in the Equal Protection Clause as the Court has interpreted the Clause -- in short, the Constitution itself has already made the necessary decision that the "policy" of fair representation limits the states' authority to apportion representation. 478 U.S. at 125 n. 9.

The present case, in contrast, requires for its ultimate resolution a decision about whether a state's decision to elect judges with statewide jurisdiction on a statewide basis must give way before a political group's claim that statewide elections are unfair to that group and its candidates for judicial office. Such a decision implicates the very existence of the states as self-governing political communities. *See Gregory v. Ashcroft*, 111 S. Ct. 2395. *Bandemer*'s holding that political gerrymandering challenges to legislative districting are justiciable is not in conflict with these principles: a judicial decision that a particular districting plan is unconstitutional merely would require the redrawing of

district lines and therefore would not "affect any fundamental state policy respecting the very structure of its legislative bodies." *Hunt*, --- F.2d at --- (Phillips, Cir. J., dissenting from denial of rehearing *in banc*) (App. 99a).

The plaintiffs' claim, however, is that the Equal Protection Clause requires "North Carolina [to] abandon its historic process of state-wide election of its superior court judges," *id.* at --- (App. 100a), and that the Clause empowers a federal court to order such a fundamental reconstruction of the state's judicial organization. In accepting the plaintiffs' invitation to adjudicate this action, the court of appeals has undertaken a task unsupported by precedent and well outside Article III's grant of "judicial power" to resolve cases and controversies. Statewide election of superior court judges, and the related state-constitutional requirement that the judges rotate outside their districts of residence, are "critical structural feature[s] of the state's judicial system." *Id.* The court below claimed the power to make "initial policy determinations" that are fundamentally non-judicial in character because they concern the very framework within which the people of North Carolina can and should organize their government.[16] The court should grant the petition for writ of certiorari in order to correct this overreaching.

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[16] The district court concluded that the complaint "seeks this court's intervention not in order to protect any constitutional right recognized by the Supreme Court's decisions, but in order to restructure the manner in which a state has chosen to elect a non-representative branch of government." *Republican Party v. Martin*, No. 88-263-CIV-5 (E.D.N.C. June 7, 1991) (App. 73a).

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE FOURTEENTH AMENDMENT'S PROHIBITION OF PARTISAN POLITICAL GERRYMANDERING OVERRIDES ENTIRELY A STATE'S FUNDAMENTAL DECISIONS ABOUT THE ORGANIZATION OF ITS JUDICIARY.

The decision of the court of appeals that this case is justiciable necessarily implies that the federal courts can grant effective relief if the plaintiffs prevail on the merits.[17] The only non-declaratory relief the plaintiffs currently are seeking is a mandatory injunction requiring that North Carolina conduct general elections for superior court judgeships by individual residential district. An order granting such relief would be an unprecedented assumption of a power to restructure a state's fundamental organization of its judiciary and would violate constitutional principles of federalism. Even if the court of appeals were correct in holding the case justiciable, it should have affirmed the dismissal of the complaint on the ground that the plaintiffs' claim is plainly foreclosed by this Court's federalism decisions.

North Carolina's decision to elect superior court judges on a statewide basis is "a fundamental policy choice respecting the structure of this critical trial-level component

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[17] A case in which the district court could afford the plaintiffs no relief likely to redress their supposed injury would not be justiciable because the plaintiffs would lack constitutional standing. *See, e.g., Allen v. Wright*, 468 U.S. 737, 751 (1984).

of the state's judicial system." *Hunt*, --- F.2d at --- (Phillips, Cir. J., dissenting from denial of rehearing *in banc*) (App. 100a). As this Court observed in *Gregory v. Ashcroft*, 111 S. Ct. 2395, a state's choice about the structure of its judiciary is "a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Id.* at 2400. *Gregory* itself involved the question of whether a state constitutional requirement that state judges retire at a certain age violated the federal Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*, or the Fourteenth Amendment. The Court upheld the state requirement under the Fourteenth Amendment and construed the Act not to cover state judges primarily because by doing so it could avoid the "potential constitutional problem" that a contrary interpretation would present. *Id.* at 2403. *See also id.* at 2405-06.

The potential problem *Gregory* identified and avoided arises from the fact that the Constitution protects the power of the individual states "'to prescribe the qualifications of its officers and the manner in which they shall be chosen.'" *Id.* at 2401 (citation omitted). The "authority of the people of the States" in this area "is a power reserved to the States under the Tenth Amendment and guaranteed them" by Article IV § 4. *Id.* at 2402.[18] This constitutionally protect-

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[18] The Guarantee Clause states that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government." U.S. Const. art. IV, § 4. The Court recently has indicated that the Clause may set justiciable limits on federal intrusion into the structure

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ed state authority to choose its own structures of self-governance sets limits to Congress's power to "alte[r] the form or the method of functioning of [a state's] government." *New York v. United States*, --- U.S. ---, 112 S. Ct. 2408, 2433 (1992) (discussing Guarantee Clause argument). Federalism similarly conditions and limits the power of federal courts to interfere with state governmental structures. *See, e.g., Growe v. Emison*, --- U.S. ---, 113 S. Ct. 1075, 1081-83 (1993); *Rizzo v. Goode*, 423 U.S. 362, 377-80 (1976).

The many decisions enforcing the Equal Protection Clause in the area of voting rights do not contradict or override these principles of federalism. The one person, one vote and racial gerrymandering cases as well as *Davis v. Bandemer* required the states to administer their electoral systems equally, without unconstitutionally diluting the weight of particular citizens' votes;[19] they did not alter the fundamental nature of those electoral systems, as the plaintiffs ask the courts to do in the present case. The apparent belief of the court of appeals that the Equal Protection Clause requires or permits the courts to substitute their views on the appropriate organization of the state's judiciary simply ignores this Court's consistent recognition that the states'

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[18](...continued)
or functioning of state governments. *See New York v. United States*, --- U.S. ---, 112 S. Ct. 2408, 2432-33 (1992).

[19] Even when it is acting to remedy a clear constitutional violation in a state's legislative or congressional districting, considerations of federalism require a federal district court not to "'intrude upon state policy any more than necessary'" to insure compliance with the federal Constitution. *Upham v. Seamon*, 456 U.S. 37, 42 (1982).

power to structure their governments "has force even as against the proscriptions of the Fourteenth Amendment." *Gregory*, 111 S. Ct. at 2405.

The consequences of the decision below also illustrate the erroneous nature of the appeals court's understanding of the relationship between the Fourteenth Amendment and federalism. If the decision below were correct, then all decisions to elect state officials on a statewide basis would be subject to political "gerrymandering" challenges where a political group as yet unsuccessful in electing its candidates is able to allege that election by districts would secure to it electoral success.[20] The implicit conclusion of the court of appeals that such a challenge would state a claim for relief sufficient to survive a motion to dismiss reflects that court's fundamental misapplication of the substantive constitutional principles of federalism as well as of the limits on the adjudicative and remedial powers of the judiciary. The decision below assumes the Equal Protection Clause licenses federal courts to redesign a state's fundamental methods of self-governance, an assumption flatly contrary to the deci-

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[20] For the purposes of determining whether a *Bandemer* claim survives a Rule 12(b)(6) motion to dismiss, there would appear to be no difference in principle between the election of superior court judges at issue in the present case and statewide election of appellate judges, state boards, and other multi-member state bodies. Indeed, it is not clear that an action challenging the statewide election of the holders of unique offices such as the governorship properly could be dismissed for failure to state a claim under the reasoning of the court of appeals. *See Hall v. Holder*, 955 F.2d 1563, 1567 (11th Cir. 1992) (single-commissioner form of government subject to vote dilution challenge under § 2 of the Voting Rights Act), *cert. granted*, --- U.S. ---, 113 S. Ct. 1382 (1993).

sions of this Court. This Court should grant certiorari in order to review the appeals court's trivialization of the state's constitutionally protected autonomy and to clarify the extent to which the Fourteenth Amendment overrides principles of federalism.

III. THE COURT OF APPEALS' HOLDING THAT THE *BANDEMER* THRESHOLD TEST IS SATISFIED BY ALLEGATIONS OF ELECTORAL DEFEAT LIMITED TO THE PARTICULAR ELECTORAL PROCESS UNDER REVIEW CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS.

In order to state a claim of unconstitutional political gerrymandering under the plurality opinion in *Davis v. Bandemer*, plaintiffs must make "a threshold showing of discriminatory vote dilution." 478 U.S. at 143.[21] Such a showing requires allegations of discriminatory intent, *id.* at 129, "a history (actual or projected) of disproportionate results," *id.* at 139, and electoral arrangements that "consistently degrade [the plaintiffs'] influence on the political process as a whole," *id.* at 132 (emphasis added). The third, "political process" prong is quite distinct from the requirement that plaintiffs allege a history of disproportionate results and meeting the disproportionality requirement does

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[21] The court of appeals concluded, in accordance with the other courts that have addressed the issue, that it should follow the plurality opinion's statement of the substantive standards to be applied in a political gerrymandering claim. *Martin*, 980 F. 2d at 955 n. 22 (App. 24a-25a).

not satisfy the "political process" prong: plaintiffs must allege, and ultimately present "specific supporting evidence," that "those who are elected will disregard the disproportionately underrepresented group." *Id.* at 132. The plurality's description of the threshold requirement and its conclusion that the Bandemer plaintiffs themselves had not met this stringent standard make it clear that plaintiffs state a claim only when they can allege that "a partisan political gerrymandering process ha[s] worked, or assuredly soon w[ill] work, an effective destruction of the power of the affected minority political party even to 'influence' the political processes of the state. . . . [T]he degradation of the minority political group's influence on the political process must extend to that 'process as a whole.'" *Hunt*, --- F.2d at --- (Phillips, Cir. J., dissenting from denial of rehearing *in banc*) (citing *Bandemer*, 478 U.S. at 132, 143) (App. 103a). In *Terrazas v. Slagle*, --- F. Supp. ---, 1993 WL 166437 (W.D. Tex. April 5, 1993), a three-judge district court considered the decision of the court below and expressly rejected that decision's interpretation of *Bandemer*. The *Terrazas* court concluded that the appeals court's "rather narrow view" misread *Bandemer* and that "the term 'political process as a whole' means straightforwardly all the structures of the state governmental system." *Id.* at *10.

Despite these clear indications that plaintiffs must be able to allege exclusion from the state's political life as a whole, and not simply lack of success in the particular electoral system they are challenging, the court of appeals held, in a footnote, that *Bandemer*'s references to the "political process as a whole" should be limited to "the

relevant political sphere." *Martin*, 980 F.2d at 956 n. 24 (App. 28a). The court therefore "confine[d its] analysis to evaluation of the claimed effect of the method of electing superior court judges on the political process of election of superior court judges within North Carolina." *Id.* Employing this interpretation of the *Bandemer* threshold test, the court concluded that the complaint states a claim because the plaintiffs alleged that the statewide election of superior court judges virtually precludes Republican candidates' success in seeking election to those positions and affects "the nomination and slating of [Republican] candidates" as well. *Id.* at 956-57 (App. 29a).

The decision below ignores this Court's reasoning in *Bandemer* that requires degradation of a plaintiff's influence on the political process as a whole and is squarely in conflict with every other reported decision addressing the issue. In each of those decisions, the "political process" requirement has been given its natural meaning and the courts have inquired into whether plaintiffs can claim that they have essentially been precluded from influence on the overall political life of the state.[22] In these decisions, the courts

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[22] The dissenting judges in the *in banc* proceeding noted that "[a]s the panel decision implicitly recognizes, dramatic successes in state-wide elections by the North Carolina Republican Party (and its cross-over allies) in recent years would make meeting this [political process] requirement impossible if 'as a whole' refers to the whole range of the state's political processes." *Hunt*, --- F.2d at --- (App. 102a-103a). This Court summarily affirmed a three-judge district court's decision dismissing a *Bandemer* challenge to North Carolina's congressional districts on precisely this basis. *Pope v. Blue*, 809 F. Supp. 392 (continued...)

held that the success of the plaintiffs' political party in elections other than those under consideration established their inability to meet *Bandemer*'s threshold; this Court summarily affirmed each of these decisions rejecting the interpretation of *Bandemer* adopted by the court below. *See Holloway v. Hechler*, 817 F. Supp. 617 (S.D.W.Va. 1992), *aff'd mem.*, --- U.S. ---, 113 S. Ct. 1378 (1993); *Pope v. Blue*, 809 F. Supp. 392, --- (W.D.N.C. 1992) (three-judge court), *aff'd mem.*, --- U.S. ---, 113 S. Ct. 30 (1992); *Fund for Accurate and Informed Representation v. Weprin*, 796 F. Supp. 662, 668-69 (N.D.N.Y. 1992) (three-judge court), *aff'd mem.*, --- U.S. ---, 113 S. Ct. 650 (1992); *Badham v. Eu*, 694 F. Supp. 664, 670-71 (N.D.Cal. 1988) (three-judge court), *aff'd mem.*, 488 U.S. 1024 (1989); *see also Terrazas v. Slagle*, --- F. Supp. ---, 1993 W.L. 166437 (W.D. Tex. April 5, 1993). Thus, the decision of the court below appears to be in conflict with the opinion of this Court and clearly creates a serious conflict among the lower federal courts as to the proper interpretation and application of *Bandemer*, a conflict that only this Court can resolve.

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[22](...continued)
(W.D.N.C. 1992) (three-judge court), *aff'd mem.*, --- U.S. ---, 113 S. Ct. 30 (1992).

CONCLUSION

The petition for a writ of certiorari should be granted.

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